Office - Supreme Court, U. S.
FILED
JUN 30 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 226

UNITED STATES OF AMERICA, ACTING ON THE RELATION OF EDMOND C. FLETCHER, AND THE SAID EDMOND C. FLETCHER, INDIVIDUALLY, PETITIONER,

VS.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CATLETT, WILLIAM F. STEPHENSON, PATRICK J. MALONEY, AND ROBERT L. NAGLE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

United States of America,
Acting on the Relation
of Edmond C. Fletcher,
and the Said Edmond C.
Fletcher, Individually,
By EDMOND C. FLETCHER,
Pro se,
Petitioner.

103 C Street, S. E.,
Washington, D. C.

SUBJECT INDEX

Petition for Writ of Certiorari 1

Summary Statement of Matter Involved 1

Reasons Relied On for the Allowance of the Writ 5

Brief in Support of Petition for Writ of Certiorari—

Opinions of the Courts Below 7

Jurisdiction 8

Statement of the Case 8

Statute Involved 8

Specification of Errors 10

Summary of Argument 11

Point A. The ruling of the court of appeals below that it does not require the act of a sovereign power to create a corporation is challenged for error 11

Point B. The ruling of the court of appeals that the Federal Home Loan Bank Board, by virtue of the power conferred upon it by Section 4 (a) of the Home Owners' Loan Act of 1933, could create the Home Owners' Loan Corporation, without obtaining a charter from the District of Columbia or one of the States of the Union, is challenged for error 11

Point C. The declaration of the court of appeals that, when adjudicating the previous case of Fletcher vs. Jones et al., 70 App. D. C. 179, 105 F. 2d 58, it decided that the Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence is challenged for error 11

Point D. The refusal of the court of appeals to consider and decide the question, duly presented by the record, whether the undated and unsigned paper writing called a "Charter," as conceived, drafted, and adopted of record by the Federal Home Loan Bank Board on June 14, 1933, created the Home Owners' Loan Corporation as a body corporate, within the meaning of the language in Section 4 (a) of the Home Owners' Loan Act of 1933, to-wit, "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation," amounts to a denial to the petitioner of his day in court 11

Point E. Petitioner's amended complaint states a claim against the respondents upon which relief can be granted 11

Argument 12

Point A 12

Point B 15

Point C 19

Point D 22

Point E 23

Conclusion 25

TABLE OF CASES

Ashley vs. Ryan, 153 U. S. 436, 441 ..... 6, 13
Brown vs. Fletcher, 237 U. S. 583, 588 23
Case vs. Kelly, 133 U. S. 21, 27 20
Cole vs. Ralph, 252 U. S. 286 23
Daviess County vs. Dickman, 117 U. S. 657, 665 20
Fletcher vs. Jones, 70 App. D. C. 179, 105 F. 2d 58 ..... 10, 11, 19, 21, 25
Graves vs. New York ex rel. O'Keefe, 306 U. S. 466 21
Harrill vs. Davis, 168 Fed. 187, 192 15
Hobbs vs. McLain, 117 U. S. 567, 575 23
Home Insurance Co. vs. New York, 134 U. S. 594 13

Hooe vs. United States, 218 U. S. 322 17
Hopper vs. Covington, 118 U. S. 148, 151 20
Kansas vs. Colorado, 206 U. S. 46, 87 17
Kohl vs. United States, 91 U. S. 367 16
Krauss Bros. Co. vs. Mellon, 276 U. S. 386, 394 23
Lamar vs. United States, 241 U. S. 103 23
Liberty Oil Co. vs. Condon National Bank, 260 U. S. 235 ..... 5, 23
Lutcher & Moore Lumber Co. vs. Knight, 217 U. S. 267 ..... 5, 22
Northwest Rolling Mills vs. Comm. Inter. Rev., 110 F. 2d 286 17
Pittman vs. Home Owners' Loan Corp., 308 U. S. 21, 32 21
Sloan Shipyards vs. United States Shipping Board and Emergency Fleet Corp., 258 U. S. 549, 564 14
State vs. Simmons, 32 Minn. 540, 542 18
Trustees of Dartmouth College vs. Woodward, 4 Wheat. 518, 536 and 629 ..... 12, 17
Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 692 ..... 5, 22
United States vs. Cohn, 270 U. S. 339 23
United States vs. Harris, 106 U. S. 629 17
United States vs. Lee, 106 U. S. 196 ..... 15, 17
United States vs. Mercur Corp., 83 F. 2d 355 23
White vs. Central Dispensary and Emergency Hospital, 69 App. D. C. 122, 99 F. 2d 355 20

TEXTBOOKS

Corpus Juris 14A, page 246, and Note 69 12
Fletcher on Corp., Sections 126 and 4117 ..... 14, 16

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

UNITED STATES OF AMERICA, ACTING ON THE RELATION OF EDMOND C. FLETCHER, AND THE SAID EDMOND C. FLETCHER, INDIVIDUALLY, PETITIONER,

VS.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CATLETT, WILLIAM F. STEPHENSON, PATRICK J. MALONEY, AND ROBERT L. NAGLE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The United States of America, acting on the relation of Edmond C. Fletcher, and the said Edmond C. Fletcher, individually, petitioner, respectfully prays that a writ of

certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on February 24, 1941, affirming the judgment of the District Court of the United States for the District of Columbia; petitioner's petition for rehearing denied on March 19, 1941.

SUMMARY STATEMENT OF MATTER INVOLVED.

On June 13, 1933, the Congress enacted a law commonly known as the "Home Owners' Loan Act of 1933" (48 Stat. 128 *et seq.*), the material provisions of which are set out in the amended complaint (R. 3-4). This act, among other things, authorized and directed the Federal Home Loan Bank Board to *create a corporation* to be known as the Home Owners' Loan Corporation, with a capital stock of not exceeding the sum of $200,000,000, to be subscribed and paid for by the Secretary of the Treasury on behalf of the United States. The then existing Federal Home Loan Bank Board was composed of the above-named respondents, all residing in the city of Washington, District of Columbia. Thereafter and on June 14, 1933, said board, in an effort to create such corporation, adopted by resolution and spread upon its records in its office in the city of Washington an undated and unsigned paper writing called a "Charter," conceived and drafted by its general counsel, Horace Russell, as a charter for the Home Owners' Loan Corporation, with a capital stock of $200,000,000, divided into 2,000,000 shares, each having a par value of $100. This paper writing is pleaded *in haec verba* in said complaint (R. 4-5).

On the following day, June 15, 1933, the respondents, acting in the name of the Federal Home Loan Bank Board, well knowing that said board had failed to procure from any sovereign, federal or state, a corporate charter for and in the name of the Home Owners' Loan Corporation, nor taken any steps toward securing such a charter, ad-

dressed and delivered a letter dated June 15, 1933, to the Secretary of the Treasury of the United States in Washington, together with a copy of said resolution, by which they represented to said Secretary of the Treasury that they had created the Home Owners' Loan Corporation as a *bona fide* body corporate, on June 14, 1933, with a capital stock of $200,000,000, divided into 2,000,000 shares, each having a par value of $100; and by said letter, did make a call upon the Secretary of the Treasury to subscribe, on behalf of the United States, for all of the purported capital stock of such pretended corporation, and to make payment therefor in the aggregate sum of $200,000,000; and, by said letter, made claim or call upon said Secretary of the Treasury for a payment of the immediate sum of $1,000,000 to said respondents, as the officers of the pretended Home Owners' Loan Corporation, as part payment for such purported capital stock (R. 6).

On June 19, 1933, the Acting Secretary of the Treasury, Mr. Dean Atcheson, by letter to the said Federal Home Loan Bank Board, subscribed for all of said purported stock on behalf of the United States, at and for the price of $200,000,000 (R. 7) and he thereafter paid, or caused to be paid, out of the Treasury of the United States, said sum of $1,000,000 to said respondents, acting in the name of said pretended Home Owners' Loan Corporation (R. 7). Thereafter and in the months of September, October, November, December, 1933, January, February, March, April, May, June, July, and August, 1934, said Federal Home Loan Bank Board, acting through the respondents, made other calls or claims upon the Secretary of the Treasury to make further payments of money for said purported capital stock, and such payments were actually made out of the Treasury of the United States, in the aggregate sum of $199,000,000, to said respondents, acting in the name of said pretended corporation, by the authority and direction of the Secretary of the Treasury (R. 9-12).

Thereafter and on May 18, 1939, petitioner brought a suit in the district court below against the respondents herein, as defendants therein, under Sections 231, 232, 234, and 235, Title 31, United States Code (1934 Ed.), to recover from said respondents the sum of $400,000,034, or double the damages sustained by the Government, plus penalties, as authorized by the provisions of Section 231, *supra*. Petitioner's amended complaint specifically alleged the above and foregoing facts (R. 2-13), and further alleged that said defendants then and there well knew that their said claims or calls and representations to the Secretary of the Treasury were false, fictitious, and fraudulent, and that the several acts so committed by them, in obtaining or aiding to obtain the payment or approval of the several claims upon and against the Government of the United States, and in thereby obtaining said sum of $200,000,000 out of the Treasury of the United States, had caused a loss and damage to the Government of the United States in the aggregate sum of $200,000,000 (R. 12).

On May 27, 1939, respondents filed their joint motion to dismiss the amended complaint on the sole ground, to-wit, "that it failed to state a claim against said defendants upon which relief can be granted" (R. 14). On October 31, 1939, the trial court, after argument on the motion to dismiss, rendered an opinion in writing (R. 15). On November 9, 1939, it entered an order and judgment sustaining the motion and dismissing the complaint (R. 15). An appeal was taken therefrom to the court of appeals below (R. 18).

On February 24, 1941, the court of appeals affirmed the judgment of the district court below (R. 19). On March 19, 1941, it considered and denied petitioner's petition for a rehearing (R. 25). The time for filing this petition was extended, by order of Mr. Justice Black, to and including June 30, 1941.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The writ prayed should be allowed by this court for the following reasons:

1. *Because of the important question of practice.* In this case the court of appeals below, in its opinion, refused to consider or even mention the question of whether the undated and unsigned paper writing called a "Charter," conceived and drafted by an attorney for the Federal Home Loan Bank Board, and adopted of record by said board on June 14, 1933 (set out in the petitioner's complaint), created a body corporate known as the Home Owners' Loan Corporation, within the meaning of the language in Section 4 (a) of the Home Owners' Loan Act of 1933, to-wit, "The board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation." This important question was expressly presented to the court of appeals by the record and assignment of errors as to the action of the trial court (which evaded the issue). The object of taking an appeal to the court of appeals below was to secure a judicial construction of the alleged charter together with the statute, *supra;* but that court also evaded the momentous issue, yet retained jurisdiction of the case and, on the merits, affirmed the judgment of the district court below (R. 19). Such practice is a departure from the accepted and usual course of judicial proceedings in an appellate court. It is, in effect, a destruction of the substantial rights of the petitioner, and, as was said by this court in *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 267, is a denial to petitioner of his "day in court," or, in other words, is equivalent to condemning him without affording him an opportunity to be heard. Such action of the court of appeals below is an avoidance of its judicial duty, and should be regulated by this court, as was done in *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245, and *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, 692, and *Lutcher & Moore Lumber Co.* v. *Knight, supra.*

2. The court of appeals below has decided a question of general importance not only to the Government of the United States, to the extent of $400,000,000 in the case at bar, but to more than 1,000,000 home owners throughout the United States, all of whom have pledged their homelands as collateral to the so-called Home Owners' Loan Corporation, and are paying thereon $600,000 per day. This question has not been, but should be, settled by this Honorable Court.

3. The court of appeals below has not given proper effect to the applicable decisions of this court in respect to the creation of corporations in the United States. This court has held in *Ashley* v. *Ryan*, 153 U. S. 436, 441, that

> "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. * * * No persons can make themselves a body corporate and politic without legislative authority."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this court, for review and determination, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket as "United States of America, Acting on the Relation of Edmond C. Fletcher, and the Said Edmond C. Fletcher, Individually, Appellant, v. John H. Fahey *et al.*, Appellees, No. 7568," and that the judgment of the court of appeals below be reversed by this court, and that your petitioner have such other and further relief in the premises as to this court may seem just and proper; and your petitioner will ever pray.

United States of America,
Acting on the Relation
of Edmond C. Fletcher,
and the Said Edmond C.
Fletcher, Individually,

By EDMOND C. FLETCHER,

Pro se,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ——————.

UNITED STATES OF AMERICA, ACTING ON THE RELATION OF EDMOND C. FLETCHER, AND THE SAID EDMOND C. FLETCHER, INDIVIDUALLY, PETITIONER,

VS.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CATLETT, WILLIAM F. STEPHENSON, PATRICK J. MALONEY, AND ROBERT L. NAGLE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported, but is copied in the record (R. 20). The opinion of the district court below is in the record (R. 15).

II.

JURISDICTION.

The judgment of the United States Court of Appeals below was rendered on February 24, 1941 (R. 19). Petitioner's petition for a rehearing was considered and denied March 19, 1941 (R. 25). By order of Mr. Justice Black, dated June 10, 1941, the time within which to file this petition for a writ of certiorari was extended to and including June 30, 1941. The jurisdiction of this court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, Chapter 229 (43 Stat. 936), Section 347 (a), Title 28, United States Code.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given in the foregoing petition, beginning at page 2, and is adopted here as though fully set forth. Emphasis is laid on the action of the court of appeals below, while refusing to consider the assignment of errors presented by the record before it, in retaining jurisdiction of the case and affirming the judgment of the district court below.

IV.

STATUTE INVOLVED.

The pertinent provisions of the Home Owners' Loan Act of 1933, 48 Stat. 128 *et seq.*, Chapter 64, are as follows:

"Definition.

Section 2. As used in this act—

(a) The term 'Board' means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

(b) The term 'Corporation' means the Home Owners' Loan Corporation created under Section 4 of this Act.

* * * * * * *

Creation of Home Owners' Loan Corporation.

Sec. 4. (a) The board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and be sued in any court of competent jurisdiction, federal or state, and which shall be under the direction of the board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the board shall constitute the board of directors of the corporation and shall serve as such directors without additional compensation.

(b) The board shall determine the minimum amount of the capital stock of the corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments of such subscriptions shall be subject to call in whole or in part by the board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States."

V.

SPECIFICATION OF ERRORS.

1. The court of appeals below erred in deciding that it does not require the act of a sovereign power to create a corporation.

2. The court of appeals erred in deciding that the Federal Home Loan Bank Board, by virtue of the power conferred upon it by Section 4 (a) of the Home Owners' Loan Act of 1933, could create the Home Owners' Loan Corporation, without obtaining a charter from the District of Columbia or one of the states of the Union.

3. The court of appeals erred in declaring that it, when sitting in a previous case, namely, *Fletcher* v. *Jones et al.*, 70 App. D. C. 179, 105 F. 2d 58, had decided that the Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence.

4. The court of appeals erred in refusing to consider and decide the question, duly presented by the record, of whether the undated and unsigned paper writing called a "Charter," as conceived, drafted, and adopted of record by the Federal Home Loan Bank Board on June 14, 1933, created the Home Owners' Loan Corporation as a body corporate, within the meaning of the language in Section 4 (a) of the Home Owners' Loan Act of 1933, to-wit, "The board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation.

5. The court of appeals erred in affirming the judgment of the district court below.

VI.

SUMMARY OF ARGUMENT.

Point A. The ruling of the court of appeals below that it does not require the act of a sovereign power to create a corporation is challenged for error.

Point B. The ruling of the court of appeals that the Federal Home Loan Bank Board, by virtue of the power conferred upon it by Section 4 (a) of the Home Owners' Loan Act of 1933, could create the Home Owners' Loan Corporation, without obtaining a charter from the District of Columbia or one of the states of the Union, is challenged for error.

Point C. The declaration of the court of appeals that, when adjudicating the previous case of *Fletcher* v. *Jones et al.*, 70 App. D. C. 179, 105 F. 2d 58, it decided that the Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence is challenged for error.

Point D. The refusal of the court of appeals to consider and decide the question, duly presented by the record, whether the undated and unsigned paper writing called a "Charter," as conceived, drafted, and adopted of record by the Federal Home Loan Bank Board on June 14, 1933, created the Home Owners' Loan Corporation as a body corporate, within the meaning of the language in Section 4 (a) of the Home Owners' Loan Act of 1933, to-wit, "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation," amounts to a denial to the petitioner of his day in court.

Point E. Petitioner's amended complaint states a claim against the respondents upon which relief can be granted.

ARGUMENT.

POINT A.

The Ruling of the Court of Appeals That It Does Not Require the Act of a Sovereign Power to Create a Corporation Is Contrary to the Fundamental Laws of This Country.

The ruling of the court of appeals below that it does not require the act of a sovereign power to create a corporation is contrary to the fundamental laws existing in this country during the past 120 years, that is, since the Dartmouth College case in 1819, where Chief Justice Marshall said:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to affect the object for which it was created. Among the most important are immortality; and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. * * * It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like an immortal being."
>
> *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 536.

The above doctrine has been restated over and over by this court, and in the inferior courts, in a thousand cases, many of which are enumerated in 14a Corpus

Juris, page 246, under Note 69. As an illustration, this court has since declared:

> "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the incorporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, without dissolution or suspension of business and with a limited liability. *The granting of such right or privilege rests entirely in the discretion of the state.*"
>
> *Home Insurance Co.* v. *New York*, 134 U. S. 594.

In *Ashley* v. *Ryan*, 153 U. S. 436, 441, this court again said:

> "That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties is settled. * * * A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. * * * Under our system, their existence and disposal are under the control of the legislative department of the government, and cannot be assumed or exercised without legislative authority. * * * *No persons can make themselves a body corporate and politic without legislative authority.* Corporate capacity is a franchise."

The Congress may, and often does, create a corporation by its *special* act, like the Reconstruction Finance Corporation (47 Stat. 5, Ch. 8). But, in lieu of a special act, Congress may, and often does, direct the formation of a federal corporation under the general laws of the District of Columbia, which it enacted, and remit the selected incorporators, as its agents, to a compliance with these

laws. When this is done, charters are granted by the District of Columbia to these incorporators. For example, the Shipping Board Act of September 7, 1916, Chapter 451, 39 Stat. 728. In *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 564, this court said:

> "The Shipping Act of September 7, 1916, Chapter 451, 39 Stat. 728, * * *, established the United States Shipping Board and gave it power to form a corporation under the laws of the District of Columbia. * * * War was declared on April 6, 1917, and the corporation was formed on the 16th of the same month."

It is thus seen that the shipping board complied with the general incorporation laws of the District of Columbia, and thereby secured a charter in the name of the United States Shipping Board and Emergency Fleet Corporation. The word "form" a corporation, as used in that act, is synonymous with the word "create" as used in the Home Owners' Loan Act of 1933.

Furthermore, Congress has frequently conferred authority upon its selected agents, usually a responsible officer of the Government, to create or form a corporation on behalf of the United States, without specifying the state or the District of Columbia, from which to obtain a corporate right, privilege, charter, or franchise. In such instances, the selected incorporators proceed to the States of Delaware, New York, Washington, or elsewhere, and, upon complying with the laws thereof, obtain a charter or certificate of incorp.oration therefrom, after which they organize such corporations. This Honorable Court will take judicial knowledge of the general incorporation laws now in force in every state of the Union, as well as the District of Columbia. Fletcher on Corporations, Section 4117.

From the above authorities, it is seen that a grievous error has been committed in this case by the court of appeals below.

POINT B.

The Federal Home Loan Bank Board, by Virtue of the Power Conferred upon It by Section 4 (a) of the Home Owners' Loan Act of 1933, Could Not Create the Home Owners' Loan Corporation, Without Obtaining a Charter from the District of Columbia or One of the States.

The ruling of the court of appeals below that the Federal Home Loan Bank Board, by virtue of the power conferred upon it by Section 4 (a) of the Home Owners' Loan Act of 1933, could create the Home Owners' Loan Corporation, without obtaining a charter from the District of Columbia or one of the states, is erroneous and contrary to law and the decisions of this Honorable Court. The pertinent language in Section 4 (a), *supra*, is, to-wit, "The Board is hereby authorized and directed to *create a corporation* to be known as the Home Owners' Loan Corporation." The petitioner has already demonstrated from the authorities that it is the charter which creates a corporation, private or public, and it is the sovereign which creates the charter. The sovereign power, then, is the source from which all corporate franchises flow. And the authorities aforementioned, under Point A herein, show the existence of general incorporation laws in the several states of the Union and the District of Columbia, authorizing the formation of corporations. These laws are higher than the Federal Home Loan Bank Board, a creature of the law, and must be obeyed. *United States* v. *Lee*, 106 U. S. 196, 227. The amended complaint shows that this board, on June 14, 1933, disregarded such laws, each and all, and failed to even apply to any sovereign, federal or state, for the grant of a charter for and in the name of the Home Owners' Loan Corporation (R. 6). Hence, the latter is not even a *de facto* corporation. See *Harrill* v. *Davis*, 168 Fed. (C. C. A.—8th Cir.) 187, 192, which deals very fully on this subject by saying:

> "To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation might open the door to frauds upon the public."

As before stated, this act merely authorized and directed that board to *create a corporation,* without giving it a mode of procedure. Congress, therefore, naturally expected its grantees to create a corporation (not a charter) by such means as were then known and appropriate. *Kohl* v. *United States,* 91 U. S. 367. These means were, to comply with the general incorporation laws of the several states and the District of Columbia; for there was no other mode in existence in this country. What, for instance, if the Congress had imposed upon the President the duty of acquiring privately owned lands for the United States for public use, without prescribing a mode of procedure. Could the President, in the execution of such power, resort to an executive order or even a proclamation, as a means for securing the title to the lands sought? The answer must be in the negative. On the contrary, he would be expected to comply with the laws in force in the state in which the lands were situated, as the means known and appropriate, by securing a deed of conveyance from the owner of the lands. We now come to the meaning of the word "create," as used in this act. This word is defined in the Kansas Statutes, Chapter 17, Section 201, thus:

> "Private corporations may be *created* by the voluntary association of five or more persons for the purposes and in the manner mentioned in the following sections of this article."

And the same word "create" is well defined in Fletcher on Corporations, Section 126, as follows:

> "To create in the broad sense is to bring into being, * * *. It has not been usual to give 'creation'

so broad a scope, and this chapter is restricted to the 'incorporation', by which is meant the performance of conditions, acts, deeds, and writing of the incorporators, and the official acts, certifications or records, which give the corporation its existence."

Moreover, when this act selected the Federal Home Loan Bank Board, composed of the respondents here, Congress made them the incorporators of the proposed Home Owners' Loan Corporation.

> "The principle that a corporate charter is a *contract* between the state and the incorporators of a corporation was established in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629, and has been reaffirmed many times."
>
> *Northwest Steel Rolling Mills* v. *Commissioner of Internal Revenue*, 110 F. 2d 286.

If so, then we find the members of the Federal Home Loan Bank Board, when they granted a charter to the Home Owners' Loan Corporation, entering into a contract with themselves, as incorporators. In other words, they sought to give to themselves the right to exist as a body corporate under the name of the Home Owners' Loan Corporation. Such philosophy of government is not only absurd, but dangerous to the social compact and the affairs of this nation. Not only this but we find in the Home Owners' Loan Act of 1933, no authority to this Board to grant or issue any charter whatever, and no mention of the word "charter". Hence, they acted without authority. This Government is a government of delegated, limited, and enumerated powers. *United States* v. *Harris*, 106 U. S. 629, 635; *Kansas* v. *Colorado*, 206 U. S. 46, 87. And, as said by this court in *United States* v. *Lee*, 106 U. S. 196,

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

In *Hooe* v. *United States,* 218 U. S. 322, this court further said:

> "If an officer of the United States assumes, *by virtue alone of his office,* and without the authority of Congress, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government 'founded upon the Constitution.' "

Moreover, the issuance of a charter to a corporation is a legislative function only, and it cannot be delegated to others. In *State* v. *Simmons,* 32 Minn. 540, 542, the court said:

> "The granting of all charters of incorporation involves the exercise of legislative functions. The proposition (says Dillon) which lies at the foundation of the law of corporations of the country is that they all, public or private, exist and can exist only by virtue of express legislative enactment, creating or authorizing the creation of the corporate body."

And further declared (p. 543):

> "One of the settled maxims of constitutional law is that legislative powers cannot be delegated. Where the constitution has located the law-making power it must remain. The department to whose judgment and wisdom it has been intrusted cannot abdicate this power and relieve itself of the responsibility, by choosing other agencies upon whom it shall be devolved. Cooley, Const. Lim., 139."

The foregoing authorities clearly show that the Federal Home Loan Bank Board, designated by Congress to "create a corporation to be known as the Home Owners' Loan Corporation," was in order to execute that power obliged to procure from a sovereign state, or the District of Columbia, a charter for and in the name of the Home Owners' Loan Corporation. *For such procedure is a requirement of the laws of the sovereign,* and such requirement has heretofore been met by officers of the United States in more than forty other instances.

POINT C.

The Declaration of the Court of Appeals That, When Adjudicating the Previous Case of Fletcher v. Jones et al., 70 App. D. C. 179, 105 F. 2d 58, It Decided That the Home Owners' Loan Corporation Had Been Properly Organized According to Law and Had Complete Corporate Existence Is Erroneous.

The declaration of the court of appeals that, when adjudicating the previous case of *Fletcher* v. *Jones et al.*, 70 App. D. C. 179, 105 F. 2d 58, it decided that the Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence is wholly erroneous. *Nowhere* in the opinion of that court in the case cited can such a declaration be found. There are, in this opinion, about 14 errors of law only, but they will not be fully discussed in this brief. Mention will be made, however, of the fact that that court added the word "itself" to the Home Owners' Loan Act of 1933, and then proceeded to construe such statute as amended by the court. There the court declared:

> "The *method* provided by the present act was that the Federal Home Loan Bank Board should *itself* create the Home Owners' Loan Corporation."

And that court, by this declaration, made it appear that the act itself had provided a "method" which that board should follow, yet the act is silent in that aspect. Moreover, in the record in *Fletcher* v. *Jones et al., supra,* there was no undated and unsigned paper writing called a "Charter" of the Home Owners' Loan Corporation, and so the court of appeals never saw it. Yet that court, in an effort to supply the omission, resorted to the following amazing declaration:

> "*We take judicial notice of the fact that the Federal Home Loan Bank Board issued a charter to the Home Owners' Loan Corporation,* immediately after the act was approved in June, 1933; organized the

> corporation and began its work six months prior to the transaction with Edna L. McCutchen, which occurred in January, 1934. These official acts have been recorded in the records and reports of the board, which are public documents and to which reference properly may be made for this purpose, even though formal proof thereof was not made in the court below."

Yet the Act of June 13, 1933, failed to authorize that bank board to "issue a charter" to the Home Owners' Loan Corporation, nor did it even mention a *charter;* and the court of appeals below certainly has no power and no duty to take judicial notice of a *void* thing—a thing which has no legal existence. *Case* v. *Kelly,* 133 U. S. 21, 27. And only one month prior to the above judicial declaration, the same court of appeals *refused* to take judicial notice of a charter of a corporation created under the incorporation laws of the District of Columbia. See *White* v. *Central Dispensary and Emergency Hospital,* 69 App. D. C. 122, 99 F. 2d 355. In *Hopper* v. *Covington,* 118 U. S. 148, 151, this court said:

> "When the law confers *no authority to issue the bonds in question,* the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value (citing cases)."

And in *Daviess County* v. *Dickman,* 117 U. S. 657, 665, it was said:

> "An officer's certificate of a fact which he has no authority to determine is of no legal effect. *Dixon County* v. *Field,* 111 U. S. 83."

These principles are quite applicable to the Federal Home Loan Bank Board in its endeavor, by its own edict, to create a $200,000,000 corporation upon behalf of the United States.

Again, in this particular case, the court of appeals further said:

"The creation and legal existence of the Home Owners' Loan Corporation has been *referred to and noticed* on a number of occasions, most recently by the Supreme Court itself in *Graves* v. *New York ex rel. O'Keefe*, 59 S. Ct. 595, 596, 83 L. Ed. 927."

And, again, that court was mistaken. For, in *Graves* v. *New York ex rel. O'Keefe*, as above cited, the petitioner, by his petition for a writ of certiorari, admitted the existence of the Home Owners' Loan Corporation as a body corporate, so there was no question raised as to its legal existence as such. And this court, speaking through Mr. Justice Stone, said:

> *"For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government."*

In *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21, 32, where the validity of that respondent was not in issue, this court said:

> *"We assume here*, as we assumed in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power."

Hence, in view of the cursory analysis of the opinion rendered by the court of appeals below in *Fletcher* v. *Jones et al., supra*, it is seen that the same court was quite mistaken in its opinion in the case at bar (R. 21) when, in attempting to say what it held in the former case, it said:

> "We examined the statute and held that Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence."

For the above language is far afield of the language, "We take judicial notice of the fact that the Federal Home Loan Bank Board issued a charter to the Home Owners' Loan Corporation."

POINT D.

The Refusal of the Court of Appeals to Consider and Decide the Question, Duly Presented by the Record, Whether the Undated and Unsigned Paper Writing Called a "Charter," As Conceived, Drafted, and Adopted of Record by the Federal Home Loan Bank Board on June 14, 1933, Created the Home Owners' Loan Corporation As a Body Corporate, Within the Meaning of the Language in Section 4 (a) of the Home Owners' Loan Act of 1933, To-wit, "The Board Is Hereby Authorized and Directed to Create a Corporation to Be Known As the Home Owners' Loan Corporation," Amounts to a Denial to Petitioner of His Day in Court.

The above subject matter is so lengthy that it is not repeated. The court of appeals below, in its opinion (R. 20-21), made no reference to this undated and unsigned paper writing called a "Charter," although duly presented by the record and assignments of error, and that court presents no explanation as to the reason why it failed to consider and decide its legal effect. For that court to retain the case and affirm the judgment of the district court below, without considering the errors assigned, is to enlarge its jurisdiction and usurp powers not conferred upon it by the law of its organization. It has evidently misconceived its duty arising under Section 26, Title 18, of the Code of the District of Columbia, from which it derives its powers and judicial duty. It may well be questioned whether a judgment upon the merits can be affirmed by an appellate court without considering the record as made. The substantial rights of the parties necessarily depend upon the consideration and decision of the assignments of error; otherwise why make a record at all. At least, such practice amounts to a denial to petitioner of his day in court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267. In *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, 692, this court held that the Circuit Court of Appeals for the Eighth Circuit, while

refusing to consider the errors assigned, and retaining the case, could not adjudicate the merits by affirming the judgment of the trial court; and, because of such refusal, granted *certiorari* and reversed and remanded the case, requiring the circuit court of appeals to consider the errors assigned. See, also, the like cases of *Brown* v. *Fletcher*, 237 U. S. 583, 588; *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235; *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 394.

While the foregoing cases announce the general procedure, yet there are cases in which this court will adjudicate the assignment of errors on the merits, rather than to remand the case to the court of appeals below. *Lamar* v. *United States*, 241 U. S. 103, and *Cole* v. *Ralph*, 252 U. S. 286, were cases of this sort.

POINT E.

Petitioner's Amended Complaint States a Claim Against The Respondents upon Which Relief Can Be Granted.

The petitioner's amended complaint (R. 2-13) well states a claim against the respondents upon which relief can be granted. All the facts therein pleaded, if well pleaded, were admitted by respondents by their motion to dismiss the complaint on the ground of insufficiency. This ground requires a discussion as to what is a "claim" as thus used, and it is answered by this court. In *Hobbs* v. *McLain*, 117 U. S. 567, 575, it was said:

> "What is a claim against the United States is well understood. It is a right to demand money from the United States."

In *United States* v. *Cohn*, 270 U. S. 339:

> "It is clear, in the light of the context, that in the present statute, the provision relating to the payment and approval of a 'claim upon or against' the government relates solely to the payment or approval

> of a claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant."

In *United States* v. *Mercur Corporation*, 83 F. 2d 178, which involved the same statutes as are involved here, the court said:

> "In order to bring a case within the statute we have referred to, it is necessary to show that a claim is presented against the United States, or *in rem* against its property."

The amended complaint in the record here shows, among other things, that the suit arises under Sections 231, 232, 234, and 235, Title 31, United States Code (1934 Ed.); that the respondents, acting for the Federal Home Loan Bank Board, by letter of June 15, 1933, made a representation to the Secretary of the Treasury of the United States, to the effect that they had, on June 14, 1933, pursuant to the Home Owners' Loan Act of June 13, 1933, created the Home Owners' Loan Corporation, with a capital stock of $200,000,000, divided into 2,000,000 shares, each having a par value of $100, and then made a demand upon the Secretary of the Treasury to subscribe for all of the capital stock, upon behalf of the United States, and that this was done by the acting Secretary of the Treasury by letter of June 19, 1933, addressed to and received by the Federal Home Loan Bank Board. The complaint further shows and alleges that said board, well knowing that it had failed to procure from any sovereign power, federal or state, a corporate charter for and in the name of the Home Owners' Loan Corporation, nor taken any steps in that behalf, as required by the general incorporation laws of the several states of the Union and the District of Columbia, and well knowing of the nonexistence of such Home Owners' Loan Corporation as a body corporate, and its lack of legal capacity to receive money from the United States, nevertheless, made seventeen calls or claims upon the Secretary of the Treasury of

the United States, between June, 1933, and December 11, 1934, for the payment of all of the purported capital stock of said pretended Home Owners' Loan Corporation, as a result of which the sum of $200,000,000 was obtained by these respondents, acting in the name of the Home Owners' Loan Corporation, from the Government of the United States. The amended complaint further alleges that said respondents then and there well knew that said representations, calls, and claims were false, fictitious, and fraudulent as against the Government of the United States.

The foregoing recital of the facts, with the other facts set out in the complaint, very clearly establish a claim against the respondents in this action. Yet the trial court dismissed the suit on the alleged authority of the case of *Fletcher* v. *Jones et al., supra*, thus preventing the petitioner from having an opportunity to be heard on the merits before a jury. Not only this, but the court of appeals below affirmed such dismissal upon the same authority.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that it may finally and permanently settle the questions involved herein, and that to such end a writ of certiorari should be granted so that this court may review the action and decision of the United States Court of Appeals for the District of Columbia, and finally reverse it.

Respectfully submitted,

United States of America,
Acting on the Relation
of Edmond C. Fletcher,
and the Said Edmond C.
Fletcher, Individually,
By EDMOND C. FLETCHER,
Pro se,
Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	7
Appendix	9

CITATIONS

Cases:	
Fletcher v. *Jones*, 105 F. (2d) 58, certiorari denied, 308 U. S. 555	5, 6
Graves v. *New York ex rel. O'Keefe*, 306 U. S. 466	5
Pittman v. *Home Owners' Loan Corporation*, 308 U. S. 21	5
Russell Wheel and Foundry Co. v. *United States*, 31 F. (2d) 826	7
Silberschein v. *United States*, 266 U. S. 221	7
United States v. *Cohn*, 270 U. S. 339	7
Statutes:	
Act of June 13, 1933, c. 64, 48 Stat. 128, *et seq.* (12 U. S. C. 1461, *et seq.*):	
Sec. 2	9
Sec. 4	9
Act of April 27, 1934, 48 Stat. 643 (12 U. S. C. 1463 (c))	6
Act of June 27, 1934, 48 Stat. 1263 (12 U. S. C. 1463 (c))	6
Act of June 27, 1934, 48 Stat. 1256 (12 U. S. C. 1725)	6
Act of May 28, 1935, 49 Stat. 296 (12 U. S. C. 1463 (c))	6
Act of August 23, 1935, 49 Stat. 709 (12 U. S. C. 24)	6
Act of June 22, 1936, 49 Stat. 1647	6
Act of June 23, 1936, 49 Stat. 1845	6
Act of May 14, 1937, 50 Stat. 155	6
Act of June 28, 1937, 50 Stat. 349	6
Act of May 23, 1938, 52 Stat. 432	6
Act of March 16, 1939, 53 Stat. 546	6
Act of April 18, 1940, 76th Cong., Pub., No. 549	6
31 U. S. C., sec. 231	10
sec. 232	11
sec. 233	11
sec. 234	12
sec. 235	12
Miscellaneous:	
37 Ops. Atty. Gen. 241	7

403406—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 226

UNITED STATES OF AMERICA, ACTING ON THE RELATION OF EDMOND C. FLETCHER, AND THE SAID EDMOND C. FLETCHER, INDIVIDUALLY, PETITIONERS

v.

JOHN H. FAHEY, THOMAS D. WEBB, FRED W. CATLETT, WILLIAM F. STEPHENSON, PATRICK J. MALONEY, AND ROBERT L. NAGLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court of the United States for the District of Columbia (R. 15) was entered without an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 19–21) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on

February 24, 1941 (R. 22). A petition for rehearing was denied March 19, 1941 (R. 24–25), and a motion to vacate the judgment was denied May 3, 1941 (R. 26–27). By order of Mr. Justice Black, dated June 10, 1941, the time within which to file a petition for a writ of certiorari was extended to June 30, 1941. The petition for a writ of certiorari was filed on June 30, 1941. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judical Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to the Home Owners' Loan Act of 1933, respondents, members of the Federal Home Loan Bank Board, created the Home Owners' Loan Corporation by issuing a charter to it and, on their request as provided by statute, received payment from the Secretary of the Treasury for the capital stock of the corporation. The question presented is whether the respondents, because they had not formed the Home Owners' Loan Corporation under the laws of the District of Columbia or of some state, are liable to the United States for having made false claims upon the Government.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the appendix, *infra,* pp. 9–12.

STATEMENT

On May 18, 1939, petitioners, pursuant to the provisions of 31 U. S. C. 231–235, brought suit

against the respondents in the District Court of the United States for the District of Columbia to recover the sum of $400,034,000, alleging that respondents had made false claims against the United States. The facts as alleged in the amended complaint (R. 2–13) are as follows:

On June 13, 1933, the Congress enacted the Home Owners' Loan Act of 1933 (*infra*, pp. 9–10) authorizing and directing the Federal Home Loan Bank Board to create as an instrumentality of the United States a corporation to be known as the Home Owners' Loan Corporation. The members of the Board were to constitute the board of directors of the corporation, and the Board was authorized to determine the minimum amount of capital stock of the corporation, and to increase such amount from time to time, but not to exceed $200,000,000. The Secretary of the Treasury was to subscribe for the stock on behalf of the United States, and the corporation was to issue to the Secretary of the Treasury receipts for payments which were to be evidence of the stock ownership by the United States. Respondents were, or have been, on or at some time since June 13, 1933, members of the Board.[1]

On June 14, 1933, certain of the respondents, acting in the name of the Board, at a meeting in Washington, D. C., "spread upon the records of said

[1] Respondents Patrick J. Maloney and Robert L. Nagle were treasurer and secretary, respectively, of the corporation, and neither was ever a member of the board of directors of the corporation.

Board" a document entitled a charter purporting to create the corporation (R. 4–5). On June 15, 1933, certain of the respondents notified the Secretary of the Treasury that the corporation was an existing body corporate, with a capital stock of $200,000,000, and requested the Secretary to subscribe on behalf of the United States to all of the capital stock and to pay therefor from the United States Treasury (R. 6). On June 19, 1933, the Acting Secretary of the Treasury, by letter to the Board, subscribed to all of the capital stock of the corporation at the price of $200,000,000, which total amount in seventeen separate installments was eventually placed in a credit account in the Treasury of the United States (R. 7–12).

The complaint alleged that the charter (R. 4–5) was spread upon the records of the Board without legal authority (R. 4), that it was null and void on its face (R. 5) since the Home Owners' Loan Act did not authorize the Board to grant a charter to the corporation, which fact respondents well knew, and that the representations to the Secretary of the Treasury that a corporation existed with capacity to receive money from the United States and all subsequent calls on the Secretary of the Treasury for payment of additional stock were false, fictitious, and fraudulent (R. 6–12). The complaint alleged that consequently the defendants are liable to the United States in double the sum of $200,000,000, and $2,000 as a penalty for each false, fictitious, and

fraudulent claim, seventeen in number, a total sum of $400,034,000 (R. 12–13).

On respondents' motion the complaint was dismissed by the District Court for failure to state a cause of action (R. 15). On appeal the order of dismissal was affirmed by the court below (R. 22). The court held, on the authority of *Fletcher* v. *Jones,* 105 F. (2d) 58 (App. D. C.), certiorari denied, 308 U. S. 555, that the "Home Owners' Loan Corporation had been properly organized according to law and had complete corporate existence" (R. 21). A petition for rehearing was denied (R. 24–25).

ARGUMENT

1. The decision of the court below is clearly correct. The Home Owners' Loan Corporation was properly created according to law. The method provided by the Home Owners' Loan Act of 1933 (*infra,* pp. 9–10) for the establishment of the Home Owners' Loan Corporation "was that the Federal Home Loan Bank Board should itself create the Home Owners' Loan Corporation." *Fletcher* v. *Jones,* 105 F. (2d) 58, 60 (App. D. C.), certiorari denied, 308 U. S. 555. The creation and existence of the corporation has been recognized and noticed by the courts. *Fletcher* v. *Jones, supra,* at p. 62, and cases cited therein; see *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 476; cf. *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21, 32. Petitioner's contention that application to a state or to the District of Columbia "is a requirement of the

laws of the sovereign" (Pet. 18) is obviously insubstantial in view of the fact that precisely this method of creation has been commonly used by Congress in the past.[2] *Fletcher* v. *Jones, supra,* at 60.[3]

2. The decision below may be supported on other and equally conclusive grounds. The calls on the Secretary of the Treasury to purchase the stock of the corporation do not constitute the making of a claim against the Government within the meaning

---

[2] Petitioners' contention (Pet. 5) that the court below denied petitioners their day in court by refusing to consider whether the so-called charter created the Home Owners' Loan Corporation is similarly without substance. It overlooks the fact that the court below expressly relied on *Fletcher* v. *Jones*, *supra*, which held that a charter had been issued and the corporation formed (*id.*, at 61) and that the court below itself held that the corporation "had been properly organized according to law." (R. 21.)

[3] Congress has, in the enactment of subsequent legislation, repeatedly recognized the Home Owners' Loan Corporation as a validly created and actively functioning Government corporation and instrumentality. See, e. g., Act of April 27, 1934, 48 Stat. 643, 12 U. S. C. 1463 (c), providing for the guarantee of the bonds of the corporation; Act of June 27, 1934, 48 Stat. 1263, 12 U. S. C. 1463 (c), and Act of May 28, 1935, 49 Stat. 296, 12 U. S. C. 1463 (c), increasing the amount of bonds the corporation might issue; Act of June 27, 1934, 48 Stat. 1256, 12 U. S. C. 1725, directing the corporation to subscribe and pay for the $100,000,000 capital stock of the Federal Savings and Loan Insurance Corporation. See also Act of August 23, 1935, 49 Stat. 709, 12 U. S. C. 24; Act of June 23, 1936, 49 Stat. 1845; Act of May 14, 1937, 50 Stat. 155; Act of June 22, 1936, 49 Stat. 1647; Act of June 28, 1937, 50 Stat. 349; Act of May 23, 1938, 52 Stat. 432; Act of March 16, 1939, 53 Stat. 546; Act of April 18, 1940, 76th Cong., Pub., No. 549.

of the statute. 31 U. S. C. 231–235. See *United States* v. *Cohn,* 270 U. S. 339, 345–346.[4] In any event, the facts alleged do not constitute the making of a claim "knowing such claim to be false, fictitious, or fraudulent."[5] As early as August 22, 1933, before the Secretary of Treasury had made any payment to the corporation for its stock and before the corporation had called for any but an initial credit of $1,000,000, the Attorney General had ruled that the Home Owners' Loan Corporation was validly organized, and referred to "the charter of the Home Owners' Loan Corporation, as adopted by the Federal Home Loan Bank Board on June 14, 1933." 37 Ops. Atty. Gen. 241 at 249. This seems to be conclusive on the issue of respondents' good faith.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions, and the corporate exist-

---

[4] No loss or damage to the Government has been shown. The money was initially deposited to the credit of the Home Owners' Loan Corporation Account in the United States Treasury and remained the funds of the United States. In any event, the corporation is a public instrumentality and even in respect of payments made by the Treasury to it, such money was no less public revenue in the corporation's hands than it was in the Treasury. *Russell Wheel and Foundry Co.* v. *United States*, 31 F. (2d) 826 (C. C. A. 6th).

[5] The allegations in the complaint that the "claims" were false, fictitious, and fraudulent, "as the defendants then and there well knew" (R. 7), are legal conclusions not admitted by demurrer. *Silberschein* v. *United States*, 266 U. S. 221, 225.

ence of the Home Owners' Loan Corporation is well settled. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
ELLIS LYONS,
Attorneys.

HAROLD LEE,
General Counsel,
E. K. NEUMANN,
Associate General Counsel,
NEIL THOMPSON,
Assistant General Counsel,
Home Owners' Loan Corporation.
JULY 1941.

APPENDIX

Act of June 13, 1933, c. 64, 48 Stat. 128, *et seq.*, 12 U. S. C. 1461, *et seq.*

DEFINITIONS

SEC. 2. As used in this act—

(a) The term "Board" means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 4 of this Act.

* * * * *

CREATION OF HOME OWNERS' LOAN CORPORATION

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

(b) The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such

stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscriptions shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States.

The provisions of Sections 231, 232, 233, 234, and 235, Title 31, United States Code, are as follows:

SEC. 231. *Liability of persons making false claims.* Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * *, shall forfeit and pay to the United States the sum of $2,000, and,

in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. (R. S., secs. 3490, 5438.)

SEC. 232. *Same; suits.* The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the persons doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent. (R. S. 3491.)

SEC. 233. *Duty of district attorney as to such cases.* It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not

exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. (R. S., sec. 3492.)

SEC. 234. *Rights of persons presenting such suits.* The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half of the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States. (R. S., sec. 3493.)

SEC. 235. *Limitation of suit.* Every such suit shall be commenced within six years from the commission of the act, and not afterward. (R. S., sec. 3494.)

U. S. GOVERNMENT PRINTING OFFICE: 1941